

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:FSH:BRK:TL-N-5251-00
REGole

date: DEC 10 2000

to: Large and Mid-size Business Division
Territory Manager (Group 1641 - Financial Services and Healthcare)
Attn: Jack Israel, Team Leader

from: Associate Area Counsel (CC:LMSB:FSH:BRK)

subject: [REDACTED]

EIN: [REDACTED]
UIL: 7602.06-03

This is in further response to your request for advice regarding the Internal Revenue Service's authority to interview a third party outside the taxpayer's presence. In addition, our office detailed the administrative procedures legislated by I.R.C. § 7602(c) for interviewing third parties. Under routine Counsel procedures, we forwarded this case to our National Office for their review of the conclusions rendered in our memoranda dated December 8, 2000. Although the National Office generally concurs with the advice previously rendered by our office, this memorandum serves to further clarify I.R.C. § 7602(c).

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

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I.R.C. § 7602(c) dictates that the Service cannot initiate any third party contacts without providing reasonable notice to the taxpayer. However, I.R.C. § 7602(c)(3)(A) expressly states that its provisions shall not apply "to any contact which the taxpayer has authorized." The taxpayer can authorize a contact either orally or in writing. This authorization should be documented in your case file. I.R.M. 8.1.5.8.9.1. An authorized contact may be implicit. For example, a taxpayer implicitly authorizes a third party contact by participating in a three-way conference call. IRM Handbook No. 13.1, section 2.6.

Arguably, the taxpayer has both implicitly and explicitly authorized the third party contact in this case. The notion of interviewing the taxpayer's former executive arose out of your dialog with the taxpayer regarding the verification of the option compensation. In fact, you reached an impasse with the taxpayer because its former executive, [REDACTED], through his representative, indicated that he did not wish the taxpayer to be present during the interview. In addition, [REDACTED] and the taxpayer were parties to a cooperation agreement.

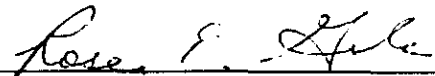
While the facts of this case suggest that, pursuant to I.R.C. § 7602(c)(3)(A), the Service may have been excepted from following the notice requirements of I.R.C. § 7602(c)(1), our office recommends that third party contact letters be issued in all cases where agents contemplate third party interviews. No third party contacts should be initiated until after the issuance of the appropriate notice. Any violation of these procedures jeopardizes the Service's right to use information obtained from third parties, as well as our authority to enforce summonses for such information. See, United States v. Jillson, 99-2 USTC 50,937 (S.D. Fla. 1999).

Our prior memorandum referenced form letter 3164E as a third party contact notice. Form letter 3164E is intended for use in correspondence audits. Form letters 3164F and 3164G are to be used in large case audits when the Service needs to make third-party contacts in order to either verify or obtain information. The third party contact procedures and forms are included in the following materials: Student Reference Guide, catalog number 85104L, and the Training number is Trng 3404-001 (06-2000). The Course # is 3404, and the Course Catalog # is 800640. These materials are available on the intranet.

Any questions regarding this opinion should be referred to Rose Gole at (516) 688-1702. We are closing our file at this time.

JODY TANCER
Associate Area Counsel

By:



ROSE E. GOLE
Attorney

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Internal Revenue Service

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to: Large and Mid-Size Business Division
Territory Manager (Group 1641- Financial Services and Healthcare
Attn: Jack Israel, Team Leader

from: Associate Area Counsel (CC:LMSB:FSH:BRK)

subject:

EIN: [REDACTED]
UIL: 7602.06-03

This is in response to your September 13, 2000 request for advice.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

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ISSUES

1. Whether the taxpayer is entitled to be present during your interview of a former executive of the taxpayer?

2. What administrative procedures are required for interviewing third parties under I.R.C. § 7602(c)?

CONCLUSION

The taxpayer is not entitled to be present at any third-party interviews. I.R.C. § 7602(c) establishes third party contact procedures.

FACTS

The facts, as we understand them to be, are as follows:

The taxpayer is under audit for the [REDACTED] year. The examination team requested information regarding the verification of a \$[REDACTED] deduction for non-qualified option compensation. A schedule breaking down the compensation indicates that \$[REDACTED] was paid to the taxpayer's former chief executive officer, [REDACTED]. The taxpayer represents that it cannot locate the relevant Forms 1099 and W-2s.

The relationship between the taxpayer and [REDACTED] is acrimonious. However, the taxpayer alleges that [REDACTED] is required to cooperate with the taxpayer pursuant to a separation agreement requiring his cooperation.

[REDACTED] represents that he never received a Form 1099 from the taxpayer, but that he received and properly reported income of \$[REDACTED]. There is a \$[REDACTED] discrepancy between the amount received and reported by [REDACTED] (\$[REDACTED]) and the amount deducted by the taxpayer corporation (\$[REDACTED]).

[REDACTED]'s representative, [REDACTED], formerly represented the taxpayer. He has indicated that he would meet with the agent in his office to discuss the stock option compensation issue. However, the taxpayer's current representative, [REDACTED], believes that he is entitled to be present during your meeting for two reasons. First, he represents the taxpayer under audit, and second, he believes the separation agreement executed by [REDACTED] compels his cooperation.

It is our understanding that you have no objection to the taxpayer's presence at the third party interview. However, in light of the witness's objection and your interest in conducting this interview, you would like to conduct this interview outside the presence of the taxpayer.

This confirms the oral advice previously provided to you

indicating that you are entitled to interview third parties outside the presence of the taxpayer. We further instructed you to follow the procedures for third party contacts under I.R.C. § 7602(c).

DISCUSSION

Issue 1:

Code section 7602 allows the Service to obtain testimony from third parties who can provide information relevant to a taxpayer's tax liability. It has long been established that taxpayers have no right to be present during third party interviews or to have representatives at the interviews. Donaldson v. United States, 400 U.S. 517 (1971); United States v. Traynor, 611 F.2d 809, 811 (10th Cir. 1979); United States v. Newman, 441 F.2d 165 (5th Cir. 1971); United States v. Linton, 72-2 U.S.T.C. ¶ 9754 (E.D. Ky. 1972); United States v. Taylor, 79-1 U.S.T.C. ¶ 9231 (E.D. Va. 1979). Accordingly, you may interview Mr. LeGuerri, if you wish to do so, outside the presence of the taxpayer's representative.¹

We have not obtained a copy of the separation agreement in effect between the taxpayer and [REDACTED]. Furthermore, we are not opining upon whether or not the contract between the taxpayer and its former executive entitles the taxpayer to participate in a meeting between the government and the former executive. However, the separation agreement is a contract between the taxpayer and its former employee. It, therefore, has no binding effect upon the Service and does not alter the Service's entitlement to obtain relevant information by interviewing third parties outside the presence of the taxpayer.

¹ There is some authority compelling the Service to allow other persons, including the taxpayer, to be present during witness interviews if the witness makes such a request. The taxpayer must allow the disclosure of taxpayer information in writing and cannot disrupt the proceedings. However, the cases are lower Court opinions, and should be limited to the types of factual situations described therein. See United States v. Puckett, 573 F.Supp. 713 (E.D. Tenn. 1982); United States v. Finch, 434 F. Supp. 1085 (D. Colo. 1977).

Issue 2:

I.R.C. § 7602(c)² establishes administrative procedures for notifying the taxpayer that contacts may be made to third parties. I.R.C. § 7602(c)(1) requires the Service to notify a taxpayer of the Service's intent to contact third parties during the course of its audit. There are various letters covering different factual situations which the Service has authorized for issuance which provide notice under I.R.C. § 7602(c). For example, form letter 3164E(DO) provides the taxpayer with the requisite notice of intent to contact third parties. In addition, the Service is required to "periodically provide to a taxpayer a record of persons contacted during such period," or if the taxpayer requests a record, it should be provided upon request. I.R.C. § 7602(c)(2).

You should be aware that, under routine procedures, which have been established for opinions of this type, we have referred this opinion to the National Office for review. That review might result in modifications of the conclusions herein. We will inform you in writing of the result of the review as soon as we hear from the National Office. In the meantime, the conclusions reached in this opinion should be considered to be only preliminary.

Any questions regarding this opinion should be referred to Rose Gole at (516) 688-1702.

JODY TANCER
Associate Area Counsel
Brooklyn

By: _____
ROSE E. GOLE
Attorney

²I.R.C. § 7602(c) was added to the Code by P.L. 105-206 (RRA 98) and is effective for contacts initiated 180 days after July 22, 1998.